Law and morality: the Russian debate at the turn of the century

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BOTH RUSSIAN AND WESTERN SCHOLARS often emphasise it to be characteristic for Russian philosophy to value morality higher than law. So, for example, Laserson (1932/3, 358) talks of a 'hypertrophy of morality at the expense of law'. Ignatow mentions the following postulate as one of the characteristics of the Russian non-Marxist philosophy:

> Morality is higher than law and justice; an accused, who was guided by a noble motive or who is a suffering and unhappy person, should be acquitted, even if he has broken the law; on the other hand, a 'bad' or selfish accused should be condemned, even if 'formally' he has not violated the law.[1]

E. Ju. Solov'ev (1999, 52) expresses a similar thought:

> Russian culture is ethicocentric ... A Russian will not accept in his heart any norm or institution that is not morally justified; hence, the ethical foundation of law has a decisive significance for the development of legal consciousness and the formation of a legal conscience in every citizen.

In the following paper I shall examine this stereotype and the question of the relationship between law and morality—not for Russian philosophy in general, but with regard to the debates in Russian philosophy of law at the turn of the nineteenth and twentieth centuries.

At the end of the nineteenth century some elements in the debate about the philosophy of law in Russia became stronger. Discussing questions about the nature of law, philosophers and jurists concentrated increasingly on fundamental theoretical questions and

[1] 'Moral steht höher als Recht und Justiz; ein Angeklagter, der sich von edlen Motiven leiten liess oder ein leidender und unglücklicher Mensch ist, soll freigesprochen werden, sogar wenn er das Gesetz verletzt hat; umgekehrt muss ein «schlechter» oder egoistischer Angeklagter verurteilt werden, sogar wenn er «formal» nicht gegen das Gesetz Verstössen hat.' (Dahm & Ignatow 1996, 238)

definitions and found an interested public for their discussions. For example, several articles about the philosophy of law were published in the widely read journal *Voprosy filosofii i psichologii.* But there were also specialised journals as for example *Pravo,* which appeared from 1898 until 1917; among its editors were well-known jurists like V.M. Gessen, V.D. Nabokov, and L.I. Petražickij. In *Pravo* we find not only 'technical' discussions about Russian and foreign laws and law reforms but also many articles concerned with fundamental questions of legal philosophy. The same is true for another important juridical journal which appeared from 1913 on— the *Juridiceskij vestnik.* B. A. Kistjakovskij, the editor of this journal, saw it as the task of the journal to discuss theoretical and practical questions of law. Intense debates about questions concerning the philosophy of law frequently took place on the pages of these journals; and questions such as the relationship between morality and law became one of the key issues.

We could say that the debate now became more 'scientific'. While in earlier debates, during the nineteenth century, questions such as the relationship between morality and law had often been regarded as a 'by-product' of political standpoints, in the debate at the turn of the century political standpoints were not of central importance. Most of the jurists I examine in this paper were members of the liberal Kadet (Constitutional-Democratic) Party and shared the same political standpoints. But—as we shall see presently—they held significantly diverse positions concerning theoretical questions concerning the philosophy of law. Political and theoretical standpoints, then, were no longer automatically tied together.[2]

In an article in *Voprosy filosofii i psichologii* in 1901, E.N. Tru-beckoj made a general comment about the development of the Russian philosophy of law. He mentioned that recent discussions in this field had been enlivened: 'A series of more or less outstanding scientists have appeared with attempts to define the essence of law, to clarify the difference between law and morality.'[3] In his opinion, the most important contributions to this debate were the following: *Opredelenie ponjatija o prave* by F. G. Seršenevič, *Pravo i nrav-stvennost'* by V. S. Solov'ev, *Filosofija prava* by B. N. Čičerin, *Sbor-nik juridičeskich znanij,* edited by Ju. S. Gambarov, and

[2] Further on Russian liberalism see Walicki (1992) and Leontovitsch (1957).

[3] «Ряд более или менее видных исследователей выступил с попытками определить существо права, выяснить отличие его от нравственности.» (Trubeckoj 1901,9)

L.I. Petražickij's *Očerki filosofii prava.* A major impulse for the debates was certainly the publication of Solov'ev's *Opravdanie dobra* and *Pravo i nravstvennost'* in 1897. These works were significant philosophical and journalistic events. As Grot (1897) underlined in a review of *Opravdanie dobra,* this work was of central importance because it was the first ethical system put forward by a Russian philosopher. The publication also provoked polemics, amongst others with Seršenevič and Cičerin, on the pages of *Voprosy filosofii i psicbologii.*

It is exactly this polemic that I would like to present on the following pages. Having first discussed the position of Solov'ev I shall consider his debates with Šeršenevič and Cičerin and then pass on to the theories of Novgorodcev and Petražickij, two jurists of the younger generation.

VS. Solov'ev's 'Opravdaniedobra'

The additional publication of *Pravo i nravstvennost'*[4] is in itself a confirmation of the central place which the question of the relationship between morality and law took in *Opravdanie dobra.* Solov'ev's starting point is the existence of a positive, close and inner relation between morality and law. He disassociates himself explicitly from such positions as deny this inner relation and by way of extreme examples he mentions Tolstoj and Cičerin:

> One opinion speaks on behalf of morality, and, wishing to conserve the purity of moral interest unconditionally, rejects the law and everything connected with it as disguised evil. The other opinion, on the contrary, denies the relation of morality and law in the name of the latter, recognising the juridical part of the relation as completely independent and in possession of an absolute principle of its own.[5]

But for Solov'ev the close relation of law and morality does not mean that the two concepts are identical. There are three important differences. First, moral demands are boundless, while the law asks

[4] *Pravo i nravstvennost'* was in the order of an extract of *Opravdanie dobra;* the fact that Solov'ev decided to publish a special text concerning the problem of law and morality shows clearly that this question was of central importance to him.

[5] «Один взгляд выступает во имя морали и, желая охранить предполагаемую чистоту нравственного интереса, безусловно, отвергает право и все, что к нему относится, как замаскированное зло. Другой взгляд, напротив, отвергает связь нравственности с правом во имя последнего, признавая юридическую область отношений как совершенно самостоятельную и обладающую собственным абсолютным принципом.» (Solov'ev 2001,4)

only for a minimum of moral demands. Second, morality does not prescribe concrete activities, while the law demands the realisation of the mentioned minimum. Third, law can and, indeed, must be backed by force, which is impossible in the domain of morality. From this follows Solov'ev's definition of law in its relation to morality:

> Law is the compulsory demand for the realisation of a definite minimum of good, or for a social order which excludes certain manifestations of evil.[6]

But is it not better to behave voluntarily as the moral norms demand than to guarantee only a minimum by force? Here we come to a central point in Solov'ev's argument—the notion of society *(obsčestvo).* For Solov'ev, a person cannot exist without society. From that argument follows another, namely that the development of the moral principle is not possible outside society. But society in turn cannot exist without the law, because, without law, the members of society would not be safe and could not survive. Thus, for Solov'ev, law is a condition for the possibility of moral perfection, meaning that law is required by the moral principle itself, even if the moral principle does not mention it explicitely.

Another important aspect of the law emerges where personal liberty is confronted with the common good *(obščee blago),* both of which are necessary for the realisation of the moral principle. In this connection the definition of law is the following:

> Law is the historically changing definition of the necessary enforced balance between two moral interests—personal liberty and the common good.[7]

According to Solov'ev, law and morality are closely related. In the hierarchy of values, then, morality is clearly higher than law, but law is absolutely necessary for the realisation of moral demands. It is thus demanded by the moral principle itself and cannot simply be replaced by morality.

[6] «Право есть принудительное требование реализации определенного минимального добра, или порядка, не допускающего известных проявлений зла. » (Solov'ev 1996, 329; Engl transi in Walicki 1992,200)

[7] «Право есть исторически-подвижное определение необходимого принудительного равновесия двух нравственных интересов — личной и общего блага.» (Solov'ev 1996, 331)

F. G. Seršenevič

After the publication of Solov'ev's work there was in 1897 a first polemic with Šeršenevič on the pages of *Voprosy filosofii i psichologii* (Šeršenevič 1897; Solov'ev 1897л). F. G. Šeršenevič (1863-1912) was a Jurist and professor of law in Kazan' and Moscow and a member of the Kadet party. At the turn of the century he was one of the best-known representatives of legal positivism in Russia.

In his polemical article against Solov'ev, Šeršenevič discusses several points. He agrees with Solov'ev's statement that the question of the relation between morality and law is one of the most important ethical problems; but in Seršenevič's opinion, Solov'ev's definition of law as a certain minimum of morality is problematical, since it is not clear of what kind of morality law should be the minimum. For Šeršenevič there are two possibilities as to how morality can be understood. It can either be the moral rules and convictions existing in a certain community at a given time and place, or it can be those existing in the subjective imagination of onejjerson. If morailty is understood in the first sense, argues Seršenevič, Solov'ev's definition is false, because, among other things, legal rules can be opposed to the moral convictions of the community. They can also be more progressive and comprehensive than the general moral consciousness and cannot therefore be a minimum of the moral norms.

Seršenevič interprets Solov'ev's theory in the second sense and criticises it: if law is the minimum of the moral idea of a given person, then the borders of this minimum are very unclear. For one individual law and morality can be identical whereas for others the minimum could be zero. Solov'ev, holds Seršenevič, has not explained how to define this minimum.

For Šeršenevič, law is positive law, made by a state and backed by force; furthermore, it must be clearly separated conceptually from morality. This does not mean that law can not be morally judged. As Hart (1986) has shown, the positivist approach to law in the sense of separating law and morality does not exclude the possibility of criticising law from a moral point of view. Seršenevič was actually very active in criticising existing laws, and in questions of law reforms he did not merely defend the status quo. He pragmatically considered law a means for society to attain its goals and he did not deem a connection of law and morality to be conducive to this end.

In this polemic it is apparent how the 'positivist' and the 'idealist' talk at cross-purposes. They use, for instance, different notions of morality. Since the two possibilities Seršenevič mentions as to how to understand morality are both empirical notions, they do not meet Solov'ev's notion of morality, and therefore Seršenevič's critique does not hit the core of Solov'ev's argumentation.

In his answer Solov'ev does not touch on this basic difference between himself and Seršenevič. He underlines that the critique of his definition of law as a minimum morality is unfounded. He had only discussed this definition, he says, by way of an incomplete and now refuted possibility of definitions, now presenting his final definition as the following:

> Law is the historically changing definition of the necessary enforced balance between two moral interests—personal liberty and the common good.[8] (Solov'ev *1897a,* 483)

The answer is interesting. As I mentioned above, the definition is one of two in *Opravdanie dobra*, but Solov'ev does not present his second definition by way of replacement for the first. Both are formulated in such a way that they seem to be valid definitions of law, each emphasising a different aspect—in the first definition the relation of morality to law is emphasised and in the second the relation of individual to society.[9]

In my opinion, these two definitions must be studied in close relation to one another. I understand the second one as explaining explicitly something which is only implied in the first. If the moral good, as Solov'ev insists, can only be realised in society, it follows even from the first definition that the relation between individual and society has to be considered. Similarly, the strong emphasis on the historically changing elements of law in the second definition implicitly exists in the first one, where the realisation of the good is mentioned, since such a realisation can only take place through history.

[8] He cites this definition directly from *Opravdanie dobra.* For the Russian text see fn 7.
[9] It is interesting to see that the problem of the two definitions is rarely discussed in the secondary literature (see for example Gäntzel (1968) and Walicki (1992)); Gurvič (Gurwitsch 1922), with his attempt to combine the two definitions, is an exception.

Thus, in his answers Solov'ev took the opportunity to underline that his position could not be reduced to the simple formula of 'law as a minimum of morality', but had to be seen in connection with his whole theory of moral perfection, of the striving for moral good.

Although central issues were discussed in this polemic and some clarifications were made, we cannot talk about new findings: the incompatibility of the two positions, the idealist and the positivist, had been made clear; no real communication had taken place. The two opponents had merely set out and explained their proper positions.

B.N. Čičerin

B.N. Čičerin (i828-1904) was probably the most famous Russian philosopher of law of the nineteenth century. At the time of this discussion he was already a 'grandfather' of the Russian philosophy of law and his works were widely known. He was well known for being a Hegelian and, in politics, a moderate liberal.

He was not a positivist, but an idealist like Solov'ev. Nevertheless he attacked Solov'ev sharply (Čičerin 1897; Solov'ev 1897*b).* Besides such questions as free will or the independence of ethics from metaphysics, one of the central issues was again Solov'ev's definition of law as a minimum of morality.

Čičerin refers to Solov'ev's critique of Tolstoj and himself. Čičerin repudiates this critique and reproaches Solov'ev, claiming that even Tolstoj's position was stronger than that of Solov'ev, since Tolstoj was at least consistent in his view that morality cannot be enforced. While Solov'ev principally agrees with this, he nevertheless wants to support morality through police and prisons.

> The mistake of Count Tolstoj consists in the fact that he does not acknowledge anything except morality, while the mistake of Mr Solov'ev is that he wants to subordinate everything to morality.[10]

Čičerin's main reproach is that Solov'ev wants to subordinate law to morality. Here Čičerin sees an enormous danger for the freedom of the individual, which for him is a key value. Thus he reproaches Solov'ev for being a successor of the Inquisition and for

[10] «Ошибка гр. Толстого заключается в том, что он, кроме нравственности, не признает ничего, а заблюждения г. Соловьева состоит в том, что он хочет подчинить ей все.» (Čičerin 1897, 685)

wanting to realise by force his idea of the kingdom of God. The idea that the state should enforce a moral minimum is unthinkable for Cičerin. For him there is a qualitative and not merely a quantitative difference between morality and law. Both principles have the same foundation—the nature of the human being as a rational free being—but they belong to different spheres of freedom: morality to the internal, law to the external freedom of the person. And as there is a qualitative difference between the two principles, it is impossible that one be considered as the minimum of the other. So the key reason for Cičerin to separate morality and law is the freedom of the individual, who cannot be subjected to force as far as the inner Me and morality are concerned.

In his answer Solov'ev underlines that he and Čičerin in principle agree on the fact that coercion is not allowed in the field of morality. Cičerin has not understood that Solov'ev, by defining law as an enforceable minimum of morality, could not extend the element of coercion to morality in the strict sense. Solov'ev had always referred to the strict border of this coercion. Solov'ev rejects Cičerin's fundamental critique and refers to the fact that Cičerin is so captured by his own system that he is unable to grasp new ideas. This is in fact a major problem of Cičerin's article. He does not try to understand Solov'ev's arguments but focuses only on the compatibility of Solov'ev's arguments with his own ideas and convictions.

In the debate about *Opravdanie dobra* we can now discern three different positions, all of them represented with some authority: Solov'ev maintains the close relation between law and morality, while Šeršenevič and Cičerin separate these principles, each, however, according to a completely different philosophical background.

At this point in our survey the stereotype of Russian philosophy as valuing morality higher than law has yet to be confirmed, the range of positions held by the scholars under review is clearly too wide. But in the wake of this polemic there were also younger authors who, influenced by the ongoing debate, worked on these questions. Two of the most important among these were P. I. Novgorodcev and L. I. Petražickij.

P. I. Novgorodcev

P. I. Novgorodcev (1866-1924) was professor of law at Moscow University and from 1906 director of the Moscow Commercial Institute. He, too, was a member of the Kadet party. His article 'Pravo i nravstvennost' ' from 1899 may in part be seen as a critical response to Solov'ev. Although he does not criticise Solov'ev explicitly—he even mentions *Opravdanie dobra* as an 'extremely interesting attempt to explain the moral foundations of law'[11]—Novgorodcev defends the position of separating law and morality. He mentions shortly, at the end of the article, that through the principle of justice law also contains a moral element, but, nevertheless, the separation of morality and law is central for him. Novgorodcev considers both law and morality as necessary means for society to solve conflicts between its members. He underlines the fact that law cannot be considered as a minimum of moral norms. Legal norms can approve of activities which are morally indifferent or even reprehensible and, accordingly, law cannot be considered as a moral minimum.

Emphasising the differences between morality and law, Novgorodcev especially underlines the fact that law prescribes exactly what we have to do and what we are not allowed to do, while morality 'only' gives us the general goals without telling us how we can attain them. Further he notes that for legal demands superficial actions are sufficient, while for moral demands the corresponding feelings and convictions are also required. Thus he puts the accent on other criteria for the separation of law and morality than does Solov'ev.

In addition, the historical consideration of this question is important for Novgorodcev, and he explains that law and morality drifted further and further apart during the development of society (a separation which he considers very positive). The reason for this he sees in the development of the notion of the individual. Because of the growing individual self-consciousness, it was increasingly unacceptable to follow the decisions of the community, and there was a demand for self-determination in matters pertaining to the inner life. Novgorodcev underlines the necessity of separating moral and legal norms and the impossibility of using force in questions of morality. In general, then, he agrees with Čičerin's critique of Solov'ev.

[11] «чрезвычайно интересная попытка выяснить нравственные основы права» (Novgorodcev 1899,134).

However, only a few years later Novgorodcev's position shifted towards greater agreement with Solov'ev and to an emphasis on a necessary relation of morality and law. Subsequently he became one of the most important representatives of the revival of natural law. In a speech in 1902 he thus underlined the necessity of giving up positivist and sociological methods in the philosophy of law and considered it to be a goal of the philosophy of law to defend the moral foundation of law (Novgorodcev 1902). It is clear from the development of Novgorodcev's views that the influence of Solov'ev was decisive for the 'school of natural law' in Russia. This was a school which attracted many young jurists and philosophers and which was of central importance in the years before the revolution of 1917.

In 1922, after revolution and emigration, Novgorodcev characterised the Russian philosophy of law—of which he regarded himself a member—in the following way: law and the state, like other exterior means to organise society must be accepted and acknowledged as necessary. But their meaning is only of secondary importance. The main goal of human striving is inner perfection, which is not possible without God. Divine law has to be the highest rule for us, meaning that our legal norms must also be in accordance with it. From this follows the close relation of morality and law in Russian philosophy. (Incidentally, for Novgorodcev, the most important representatives of this philosophy were Dostoevskij and Solov'ev (Novgorodcev 1922).) Thus, in the later period of his work, Novgorodcev characterises Russian philosophy explicitly as a philosophy in which law is based on moral principles.

L. I. Petražickij

L.I. Petražickij (1867-1931) was professor of law at St Petersburg University and also taught at the Pedagogical Academy in St Petersburg. Like Seršenevič and Novgorodcev he was a member of the Kadet party.

With his appearance on the academic stage and his first articles, the debate about the question of law and morality became fiercer. According to Timasheff (in Petražickij 1955), previous debates had generally been conducted with great courtesy. Petražickij, however, stressed that all previous theories and methods of the philosophy of law were completely wrong, and he embarked on a collision course with his opponents defending an approach radically different from that of the others. Because of his theory he met with rejection on the

one hand, while on the other he found many enthusiastic students, one of whom was the young addressee of Tolstoj's famous *Letter about the law* (Tolstoj 1911).

From 1900, Petražickij began developing his theory in articles and books ; at the same time there appeared critiques and polemics in several journals.[12] A detailed presentation of his theory was given in *Teorija prava i gosudarstva v svjazi s teorie] nravstvennosti* (1909), in which the psychological definition of law and morality constituted a new approach:

> It is clear ... that moral and legal norms and obligations represent nothing actually and objectively outside the minds of the individuals asserting or denying their existence, and apart from those individuals. They are merely reflections or projections of the psychic states of those individuals. (Petražickij 1955,112)

Although both are psychological phenomena, Petražickij distinguishes clearly between legal and moral obligations and norms and he defines them as follows:

> Obligations conceived of as free with reference to others … we shall term *moral obligations.* Obligations which are felt as unfree with reference to others … we shall term *legal obligations,* (ibid., 45 f)

Furthermore, two kinds of norms correspond to the two kinds of obligations. Some norms prescribe a certain conduct for us but give others no claim or rights to fulfilment by us. These he characterises as unilateral, binding, non-exigent, purely imperative norms —and this is his definition of moral norms. Other norms establish obligations which are made secure on behalf of others; these norms he characterises as binding-exigent, imperative-attributive—these are the legal norms.

Once he has defined the distinction between morality and law, Petražickij looks at the different motivational and educative effects of moral and legal experience; and this is a point where we can clearly see the crucial importance of legal norms for Petražickij. For him, the attributive nature of the consciousness of legal duty gives this consciousness a special motivational force which is stronger than the one of moral norms:

> That the legal imperative-attributive mentality can evoke relatively general and constant observance of the corresponding rules of social

[12] See for example Trubeckoj (1901) or, later, Novgorodcev (1913).

> conduct must be recognised as a great advantage of this branch of ethics over the purely imperative morality which has no such motivational force, (ibid., 94 f)

The point at which the purely moral consciousness converts to legal consciousness is for him an important step forward:

> Law, more successfully and constantly than morality, confirms socially desirable habits and propensities and eradicates the opposite elements of character ... and so exerts a more consistent and powerful educative influence on human minds than does morality, (ibid., 95)

After these few extracts from his theory it is evident that for Petražickij— in contrast to the other theories discussed previously—not morality but law is the higher value. For him, there is a development from the moral to the legal consciousness and not the other way round. Both for the individual and for society law is more important than morality.

Conclusion

Examining the five positions I have tried to present in this paper (those of Solov'ev, Seršenevič, Cičerin, Novgorodcev, and Petražic-kij), we can see that there existed in Russia a wide range of opinions on the question we are interested in here. The positions range from claiming a close relation between morality and law, where morality is seen as the higher value, to a clear separation of the two principles and even to the position where law is considered a higher value than morality. We also see that there existed different theories or strategies to defend the value of law against legal nihilism. Thus, at least as regards the philosophers and jurists at the turn of the century, it is not possible to state categorically that 'the' Russian philosophy of law values morality higher than law. The stereotype cannot be confirmed in so general and simple a form.

But if this is obviously so, where does the stereotype come from? And why is it so persistently repeated? This would be a question for another paper altogether; I would like to mention here just four points as a first attempt to answer it:

First of all, as I mentioned at the beginning, only a small part of the intelligentsia has been discussed here, viz. the part, mostly consisting of qualified jurists, who were active in discussions of legal questions and might all be considered 'defenders of law'. This group

is certainly not representative for the Russian philosophy of the so-called silver age as a whole. Nevertheless, the thinkers presented here should not be neglected when we study Russian philosophy and try to find its characteristics.

Second, by looking at the articles in philosophical and juridical journals we can see that the 'school' of natural law grew stronger and became very influential indeed. Correspondingly, the position which emphasised the relation of law and morality found more and more support. Evidently, we must see this in connection with a general tendency in Russian philosophy at the turn of the century, that is the movement 'from Marxism to idealism' and the growing importance of religious thinking. This movement has led to a general picture of the epoch in which smaller currents are barely noticed.

A third reason could be that not all the above-mentioned thinkers defended particularly original approaches. Čičerin was Hegelian, his system is interesting in the Russian context but it was not a new theory. Seršenevič as a legal positivist also defended a position coming from Western Europe which was already well known. The most original theories were, in my opinion, those of Solov'ev and Petražickij. However, Petražickij did not have much influence in Russia—he came 'too late', and most of his students (for example Timasheff, Laserson, Sorokin) were to emigrate after the revolution. They partially developed his theory further, but not with the claim of defending a genuinely Russian philosophy.

The influence of Solov'ev on the other hand was significant, especially on the natural law theory. Solov'ev was considered the first great Russian philosopher, and although the influence of European theories, especially neo-Kantian theories, was important for the natural law theory, it could be seen as a 'Russian' theory thanks to the influence of Solov'ev.

Last but not least, it is also a question of reception. In the secondary literature emphasis has tended to be placed on those philosophers for whom morality is more important than law.[13] A typical example is the above-mentioned article by Novgorodcev from 1922. This and similar articles are often quoted and—by way of a chain reaction—the picture of a Russian philosophy which values morality higher than law is spread and strengthened.

[13] Cf. also Zen'kovskij (1950)

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